EON Bank Bhd (previously known as Oriental Bank Bhd) v Mohd Yunus bin Alias & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–250 OF 2003
MARY LIM JC
26 APRIL 2010

Contract — Certificate of indebtedness — Defendants chose not to adduce any evidence — Defendants did not show any manifest errors on face of certificate — Whether plaintiff could rely on certificate of indebtedness to conclusively prove its claim

Contract — Guarantee — Liability of guarantors — Whether plaintiff's claim against guarantors time-barred — Whether plaintiff's duty to realise securities before filing action against guarantors — Limitation Act 1953 s 6 — Contracts Act 1950 s 92

Evidence — Burden of proof — Election by defendants not to adduce any evidence — Effect of — Whether plaintiff proved its claim on balance of probabilities

The plaintiff bank granted a company known as Central Wire Industries Sdn Bhd ('the principal borrower') a package of credit facilities. The defendants executed a guarantee agreement whereby they stood as joint and several guarantors for those facilities. When the principal borrower defaulted in the repayment of those facilities the plaintiff commenced an action against the principal borrower and the guarantors. On 3 March 1998, a default judgment was entered against the principal borrower but the action against the guarantors was struck out for want of prosecution. Thereafter the plaintiff issued a letter of demand dated 10 March 1997 on the guarantors. When the guarantors failed to settle the outstanding sum, the plaintiff commenced the present action against the defendants. The defendants then applied to strike out the action on the grounds that it was an abuse of the court process but that application was dismissed with costs. This was the hearing of the substantive claim. In their defence the defendants had submitted that the plaintiff's claim was time barred under s 6 of the Limitation Act 1953. In this regard the defendants submitted that the cause of action against them accrued when the principal borrower failed to settle the outstanding amount on 8 November 1996, ie within the 14 days allotted to it by the plaintiff's letter to the principal borrower dated 25 October 1996 to settle the said sum. As such the defendants contended the last date for filing a valid claim would be 7 November 2002 but

since the instant action was filed on 18 February 2003 it was time-barred. The defendants also averred that it was the plaintiff's duty to realise the securities before filing an action against the defendants. In support of this submission the defendants referred to the plaintiff's refusal to appoint receivers and managers to look after the interests of the principal borrower which was seen as misconduct and willful negligence on the part of the plaintiff, which under s 92 of the Contracts Act 1950 ('Act') discharges the defendants. The plaintiff called two witnesses who testified substantially on the debt. The plaintiff contended that the certificate of indebtedness was conclusive and binding evidence of the debt as agreed in the relevant loan and guarantee documents. At the close of the plaintiff's case, the defendants submitted that they would not be calling any witnesses on the grounds that the plaintiff had not proved its case and that there was thus no case to answer. Consequently the defendants were put on election and elected not to adduce any evidence to support their defence. At this point, with the stand taken by the defendants, the court was not concerned with the defences or the defendants' case but for completeness the issues raised were addressed in this judgment.

Held, allowing the plaintiff's claim with costs:

(1) Although both parties in this case were in agreement that the breach in this case was the failure to pay on demand, they did not agree on which of the plaintiff's letters constituted the demand ie, whether it should be the plaintiff's letter of 25 October 1996 as submitted by the defendants or its letter of 10 March 1997 as submitted by the plaintiff. Clause 17 of the guarantee agreement or the principal debtor clause was intended to allow the creditor the right to sue the guarantors in the event of a default without requiring the creditor to first seek recourse against the principal borrower. In other words a separate and specific demand must be made on the guarantors and it is upon the failure to pay on that demand that the cause of action would accrue. In any case, the plaintiff's cause of action was founded on the defendants' default in relation to the letter of 10 March 1997 and not by reason of the defendants' default as principal debtor. In the circumstances, the claim against the defendants was not time-barred under s 6 of the Limitation Act 1953 (see paras 12–14, 16 & 20).

(2) The defendants had not satisfied the requirements of s 92 of the Act for that section to apply to this case. Further, the existence of clear express terms contrary to s 92 of the Act peppered throughout the guarantee agreement showed that the parties had contracted out of the provisions of the Act, which they were free to do (see paras 25–26).

(3) The certificate of indebtedness would lose its quality of representing conclusive evidence where the defendants could show that there were manifest errors in that certificate. However, since the defendants in this

case had chosen not to adduce any evidence, the certificate tendered by the plaintiff became not only conclusive evidence of the outstanding debt but also true in the component of correct prevailing base lending rates. There was no evidence to the contrary before the court to cast doubt on the accuracy of the certificate. In the circumstances, contrary to the defendants' submission, the plaintiff had indeed proved its claim on a balance of probabilities (see paras 30 & 32–33).

[Bahasa Malaysia summary

Plaintif memberikan satu pakej kemudahan kredit kepada syarikat yang dikenali sebagai Central Wire Industries Sdn Bhd ('peminjam utama') satu pakej kemudahan kredit. Defendan-defendan menandatangani satu perjanjian jaminan di mana mereka menjadi penjamin secara bersama dan berasingan bagi kemudahan-kemudahan tersebut. Apabila peminjam utama gagal untuk membuat pembayaran balik kemudahan-kemudahan tersebut plaintif memulakan tindakan terhadap peminjam utama dan penjamin-penjamin. Pada 3 Mac 1998, penghakiman ingkar telah dimasukkan terhadap peminjam utama tetapi tindakan terhadap penjamin-penjamin dibatalkan akibat ketiadaan pendakwaan. Selepas itu plaintif mengeluarkan sepucuk surat tuntutan bertarikh 10 Mac 1997 kepada penjamin-penjamin. Apabila penjamin-penjamin gagal menyelesaikan jumlah tertunggak tersebut, plaintif memulakan tindakan terhadap defendan-defendan. Defendan-defendan kemudiannya memohon untuk membatalkan tindakan itu atas alasan bahawa ia ialah penyalahgunaan proses mahkamah tetapi permohonan tersebut telah ditolak dengan kos. Ini adalah perbicaraan substantif tuntutan tersebut. Dalam pembelaan mereka defendan-defendan telah menghujahkan bahawa tuntutan plaintif dihalang oleh had masa di bawah s 6 Akta Had Masa 1953. Berkaitan dengan ini defendan-defendan menghujahkan bahawa kausa tindakan terhadap mereka terakru apabila peminjam utama gagal untuk menyelesaikan jumlah yang tertunggak pada 8 November 1996, iaitu dalam tempoh masa 14 hari yang diperuntukkan oleh surat plaintif bertarikh 25 Oktober 1996 kepada peminjam utama bagi menyelesaikan jumlah tersebut. Oleh itu defendan-defendan menyatakan bahawa tarikh akhir untuk memfail satu tuntutan sah adalah 7 November 2002 tetapi memandangkan tindakan ini difailkan pada 18 Februari 2003 ia dihalang oleh had masa. Defendan-defendan juga menyatakan bahawa ia adalah tugas plaintif untuk merealisasikan sekuriti-sekuriti sebelum memfail satu tindakan terhadap defendan-defendan. Bagi menyokong hujahan ini defendan-defendan merujuk kepada keengganan plaintif melantik penerima-penerima dan pengurus-pengurus untuk menjaga kepentingan peminjam utama yang mana dilihat sebagai salah laku dan kecuaian disengajakan oleh plaintif, yang di bawah s 92 Akta Kontrak 1950 ('Akta') melepaskan defendan-defendan. Plaintif memanggil dua saksi yang memberi keterangan sebahagian besarnya berkenaan hutang tersebut. Plaintif menyatakan bahawa sijil keberhutangan merupakan bukti konklusif dan bukti yang mengikat hutang tersebut seperti

yang dipersetujui dalam pinjaman berkaitan dan dokumen-dokumen jaminan. Di akhir kes plaintif, defendan-defendan menghujahkan bahawa mereka tidak akan memanggil mana-mana saksi atas alasan plaintif tidak membuktikan kesnya dan oleh itu tiada kes untuk dijawab. Akibatnya defendan-defendan diletakkan atas pilihan dan melantik untuk tidak mengemukakan sebarang bukti menyokong pembelaan mereka. Pada ketika ini, dengan pendirian diambil oleh defendan-defendan, mahkamah tidak mengambil berat dengan pembelaan atau kes defendan-defendan tetapi bagi tujuan kesempurnaan isu-isu yang ditimbulkan telah dikemukakan dalam penghakiman.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Walaupun kedua-dua pihak dalam kes ini bersetuju bahawa kemungkiran dalam kes ini adalah kegagalan membayar atas tuntutan, mereka tidak bersetuju surat-surat plaintif manakah yang menjadi tuntutan iaitu, sama ada ia sepatutnya surat plaintif bertarikh 25 Oktober 1996 seperti yang dihujahkan oleh defendan-defendan atau surat bertarikh 10 Mac 1997 seperti yang dihujahkan oleh plaintif. Klausa 17 perjanjian jaminan atau fasal penghutang utama bertujuan untuk membenarkan pemiutang untuk menyaman penjamin-penjamin jika berlaku satu kemungkiran tanpa memerlukan pemiutang terlebih dahulu menuntut terhadap peminjam utama. Dengan erti kata lain satu tuntutan berasingan dan khusus mesti dibuat terhadap penjamin-penjamin dan di atas kegagalan membayar terhadap permintaan itu kausa tindakan akan terakru. Walau bagaimanapun, kausa tindakan plaintif adalah berasaskan kepada keingkaran defendan-defendan berkaitan dengan surat bertarikh 10 Mac 1997 dan bukannya sebab keingkaran defendan-defendan sebagai penghutang utama. Dalam keadaan itu, tuntutan terhadap defendan-defendan tidak dihalang oleh had masa di bawah s 6 Akta Had Masa 1953 (lihat perenggan 12–14, 16 & 20).

(2) Defendan-defendan tidak memenuhi kehendak syarat-syarat s 92 Akta tersebut bagi seksyen itu digunakan dalam kes ini. Selanjutnya, kewujudan terma-terma jelas bertentangan dengan s 92 Akta tersebut yang menghujani sepanjang perjanjian jaminan menunjukkan bahawa pihak-pihak telah berkontrak mengeluarkan peruntukan-peruntukan Akta tersebut, di mana mereka bebas melakukannya (lihat perenggan 25–26).

(3) Sijil keberhutangan akan hilang kualitinya bagi mewakili keterangan muktamad apabila defendan-defendan boleh menunjukkan bahawa terdapat kesilapan-kesilapan jelas dalam sijil itu. Bagaimanapun, memandangkan dalam kes ini defendan-defendan telah memilih untuk tidak mengemukakan sebarang bukti, sijil yang ditender oleh plaintif bukan sahaja menjadi keterangan muktamad hutang yang

belum dibayar tetapi juga terhadap kebenaran komponen kadar-kadar pinjaman asas terkini. Tiada bukti yang bertentangan di hadapan mahkamah bagi melempar keraguan terhadap ketepatan sijil tersebut. Dalam keadaan itu, bertentangan dengan hujahan defendan-defendan, plaintif telah sememangnya membuktikan tuntutannya atas imbangan kebarangkalian (lihat perenggan 30 & 32–33).]

Notes

For cases on burden of proof in general, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 349–672.

For cases on liability of guarantor, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4097–4105.

Cases referred to

Bank Bumiputra Malaysia Bhd v Esah binti Abdul Ghani [1986] 1 MLJ 16, SC (folld)

Bank of Tokyo Ltd v R Gnansurian [903] MD 2; [1989] 1 CLJ 344, HC (folld)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363; [1995] 3 CLJ 690, CA (refd)

Ex parte Young (1908) 209 US 123, SC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd) [2008] 2 MLJ 773, CA (distd)

Kitchin, In re (1881) 17 Ch D 668 (refd)

Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175; [1988] 1 CLJ 770, HC (refd)

Microsoft Corp v PC House (Imbi) Sdn Bhd [1998] 6 MLJ 402, HC (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610, SC (refd)

Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 AMR 1620, CA (refd)

Ooi Boon Leong & Ors v Citibank NA [1984] 1 MLJ 222, PC (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155, SC (refd)

Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ (Rep) 585, HC (refd)

Perwira Affin Bank Berhad (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Berhad) Kuala Lumpur High Court Civil Suit No D2–22–1557 Tahun 1998 (unreported) (distd)

Phonographic Performance Ltd v Maitra, Same v Andrew & Anor; Same v The Underworld (Bradford) Ltd [1998] 1 WLR 870, CA (refd)
Raju Jayaraman Kerpaya v Chung Kiaw Bank Ltd [1997] 2 MLJ 590; [1997] 3 CLJ 216, CA (refd)

Legislation referred to

Contracts Act 1950 s 92
Limitation Act 1953 s 6
Rules of the High Court 1980 O 42 r 12

BH Yap (Choo Mun Wei and Vanessa Wong Fui San with him) (Mah-Kamariyah & Philip Koh) for the plaintiff.
Francis Brigged (Hamid Sultan Loga Chitra & Associates) for the first and second defendants.
M Muthuraman (Muthu & Partners) for the third defendant.

Mary Lim JC:

[1] The plaintiff granted a package of credit facilities to a company known as Central Wire Industries Sdn Bhd ('principal borrower') subject to the terms and conditions as found in the letter of offer dated 31 October 1995 and facility agreement dated 21 November 1995 for the purpose of facilitating or financing local purchase of raw materials and to accommodate usance sales to the principal borrower's customers. The credit facilities consisted of overdraft of RM500,000, letter of credit, trust receipt and banker's acceptance. The defendants stood as joint and several guarantors for those facilities and executed a guarantee agreement dated 21 November 1995.

[2] The principal borrower defaulted in the repayment of the facilities. An action was commenced against the principal borrower and the guarantors at the High Court in Kuala Lumpur vide Civil Suit No D1–22–401 of 1997. On 3 March 1998, a default judgment was entered against the principal borrower but the action against the guarantors was struck out for want of prosecution.

[3] Subsequently, the plaintiff's solicitors issued a letter of demand dated 10 March 1997 on the guarantors. The guarantors failed to settle and the present action was then filed. The defendants took umbrage claiming that the second action was an abuse of the court process. An application to strike out this action for that reason was initiated. The application was dismissed with costs and later affirmed by the Court of Appeal. This is now the hearing of the substantive claim.

[4] The first and second defendants were represented by Mr Francis Brigged whereas the third defendant was represented by Mr Muthuraman. However, as

the defences filed raised common issues and to avoid duplication of work, the defendants agreed that Mr Muthuraman would conduct the cross-examination of witnesses and submit for all the defendants.

[5] At the start of the trial, this court was informed that the parties had agreed that three principal issues arise for disposal, namely:

(a) whether the claim was time-barred;

(b) whether the plaintiff was under a duty to realise the securities before filing an action against the defendants; and

(c) whether the plaintiff was entitled to vary the interest charged without notice to the defendants.

[6] The plaintiff called two witnesses, one of whom was the manager of the branch bank at the material time. These witnesses testified substantially on the debt and were cross-examined by Mr Muthuraman. However, at the close of the plaintiff's case, Mr Muthuraman informed the court that the defendants would not be calling any witnesses. When asked to clarify, learned counsel explained that the defendants were submitting that there was no case to answer as the plaintiff had not proved its case. Consequently, the defendants were put on election and elected not to adduce any evidence following the submission. The melange of implications of this submission is both far-reaching and serious. Once the defendants have made that election not to adduce any evidence, they are bound. It is therefore not a decision to be taken lightly. Despite being reminded, the defendants held steadfast to the decision on election.

[7] Bearing in mind the fact that the parties had already identified three issues for disposal, the submission of the defendants needs to be properly reviewed. Two of these issues are defences while the third issue concerning the variation of interest may be taken on board when evaluating the plaintiff's case for the purpose of determining whether the plaintiff's case has been proved. It is frequently overlooked that in considering whether the submission has been properly and correctly taken in any particular instance, the court is only considering the plaintiff's case. At this point, the court is not concerned with the defences or the defendants' case. Hence, the submissions on the issues of limitation and realisation of securities may be properly ignored. Be that as it may and for completeness, I shall nevertheless address the issues.

WHETHER THE CLAIM WAS TIME-BARRED

[8] It is the defendants' submission that the plaintiff's claim is time-barred under s 6 of the Limitation Act 1953. According to Mr Muthuraman, since the

claim in essence is for a breach of contract, the claim must be made within six years from the date when the cause of action accrued. In his view, the cause of action accrued when the principal borrower failed to pay after being reminded by the plaintiff vide letter dated 25 October 1996. That failure to pay is an event of default under section 14.01(1)(a) of the facility agreement. As that letter gave the principal borrower 14 days to settle the outstanding amount of RM1,014,390, the last date for paying is 8 November 1996. For the purpose of s 6 of the Limitation Act 1953, time begins to run from that date as against the principal borrower. Learned counsel submitted that by virtue of what is known as the 'principal debtor clause' which is to be found at section 17 of the guarantee agreement, the guarantors are also principal debtors. That being so, time will also start to run from the date of the final reminder for any actions to be filed against the guarantors. The last date for filing a valid claim would be 7 November 2002. This action was filed on 18 February 2003. That being so, the claim is clearly time-barred.

[9] Learned counsel was also of the view that by reason of this same clause, there was no requirement for a separate letter of demand to be issued to the guarantors. It would be mere surplusage — see *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175; [1988] 1 CLJ 770. In fact, the filing of a writ of summons is itself a valid claim as decided in *Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773.

[10] In response, Mr BH Yap, learned counsel for the plaintiff argued that this was an on-demand guarantee as evident by cl 1 of the guarantee which states:

> We will pay you on demand all sums of money which are now or shall hereafter from time to time and at any time be owing to you from the Customer or remain unpaid on the general balance of the Customer's Account with you or on any account or accounts whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons including the amount of notes ...

[11] Further, the plaintiff is relying on section 15.01 of the facility agreement which, inter alia, provides that 'Time provided for in law for recovery shall not run until a demand has been made by the Bank and no waiver or extension of time has been granted'. The demand was only made on 10 March 1997 and it is upon the failure to pay on this demand that the cause of action against the defendants accrued. On these facts, it was maintained that the action was filed within the time prescribed under s 6 of the Limitation Act 1953.

[12] On this first issue, this is my finding. The accrual of a cause of action in contract depends on whether there is a breach of any of the contractual terms.

Both parties are in agreement that the breach here is the failure to pay on demand. What they do not agree on is which of the plaintiff's letters constitutes the demand. Should it be its letter of 25 October 1996 as submitted by the defendants or its letter of 10 March 1997 as maintained by the plaintiff?

[13] In answering this, I shall start with the matter of the principal debtor clause, cl 17 which states:

> Though as between us and the Customer we are sureties for the Customer, yet as between us and you we and each of us shall be deemed to be principal debtors for all moneys the payment of which is hereby guaranteed and accordingly shall not be discharged nor shall our liability be affected by any fact or circumstances or any act thing omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors.

[14] In the context of guarantors, this clause is intended to allow the creditor the right to sue the guarantors in the event of a default without requiring the creditor to first seek recourse against the principal borrower. The creditor may sue both principal borrower and guarantors as principal debtors at the same time. It does not however mean that a demand to the principal borrower is to be construed as a demand on the guarantors. In my view, a separate and specific demand must be made on the guarantors and it is upon the failure to pay on that demand that the cause of action accrues. If, at the same time as calling on the principal borrower to pay, and it can even be in the same letter, the plaintiff also made a call or a demand on the guarantors to pay, and the guarantors do not pay, then rightly in such an instance, time may be said to also run against the guarantors.

[15] The letter of demand that formed the basis of the first action against the principal borrowers and the guarantors is not before me. What is before me is the letter of 25 October 1996 which is a final reminder to the principal borrower. This letter cannot be construed as one issued also to the guarantors by reason of the principal debtor clause. It is even arguably not a letter of demand in view of provisions in the facility agreement, especially section 15.01. All that is available is the judgment in default and the letter of demand dated 10 March 1997. In *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 the Supreme Court had already cautioned at p 528 that '... all the evidence led by the plaintiff must be assumed to be true'. In the absence of any other letter of demand and with what is obviously a letter of demand before me, I can only say that the letter of 25 October 1996 is not a letter of demand but the letter of 10 March 1997 is.

[16] In the circumstances, with the defendants' submission and election, I am obliged to treat the evidence adduced by the plaintiff, that is, the letter of 10 March 1997 as true. In any case, the plaintiff's cause of action is founded on the defendants' default in relation to that letter and not by reason of the defendants' default as principal debtor. A perusal of the statement of claim confirms that the defendants are sued as joint and several guarantors — see para 7 of the statement of claim. The plaintiff has a choice of how to frame its case and it is one premised under cl 1 of the guarantee and not cl 17 of the facility agreement. Clause 1 requires the plaintiff to make a demand on the defendants. As decided by the Supreme Court in *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155, the liability of the guarantors is dependent on the language of the instrument that created the relationship between the parties and the 'nature of the liability it creates'. As much as the guarantors may be entitled to insist on the strict adherence to the terms of the guarantee and cannot be held liable for more than what was undertaken, this must similarly hold true for the plaintiff. The plaintiff is equally entitled to insist on the rigid adherence to the terms of the guarantee. In this guarantee, the parties had agreed that the defendants 'will pay you on demand all sums of money'. The plaintiff cannot be faulted for having complied with the terms of the guarantee and complying with the condition precedent to filing of the claim.

[17] There is also the matter of the defendants' requests for time to settle the outstanding amounts. From the evidence of both the plaintiff's witnesses, Puan Jati Fa'izah bt Jajuli, assistant manager, Credit Recovery Centre (PW1) and Mr Gan Ching Lock (PW2), then manager of the plaintiff's branch bank which handled the principal borrower and the defendants' account, it appears that the principal borrower was in the midst of being bought over by a third party. There are several letters signed by the third defendant as executive chairman of the principal borrower seeking extensions of time to settle the overdue amounts as indicated under cover of the plaintiff's letter dated 25 October 1996. On 14 November 1997, the plaintiff was still writing to the defendants' vide its representatives, SMAT Consultants to settle the outstanding amounts. Again, as agreed between the parties under section 15.01, time will not begin to run for recovery until a demand has been made and no waiver or extension of time has been granted. Time therefore cannot start to run until this matter has been resolved.

[18] The facts in this case are quite distinct from those in *Joseph Thambirajah v Bank Buruh (M) Bhd (Now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773. In that case, the respondent bank had issued three letters of demand. The first dated 23 March 1980 had been issued against the principal borrower and all the guarantors. A suit was then filed on 11 March 1982

against all of them when there was a failure to pay. Summary judgment was obtained against the principal borrowers and two of the guarantors. On 7 November 1991, with leave of the court, the suit was withdrawn against the appellant. Subsequently, a second letter of demand dated 4 May 1992 was issued against the appellant and about a month later, on 10 June 1992, a third letter of demand was issued. A fresh action was then instituted against the appellant on 29 August 1992 and after a full hearing, the claim was allowed. On appeal, the Court of Appeal found, inter alia, that the cause of action occurred upon the issue of the first letter of demand if not on the date of filing of the first suit. The court applied the 'principle that for the purpose of limitation, time began to run from the earliest date on which the creditor could have brought an action' — see also *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 AMR 1620. The court found it untenable that final judgment could be entered against the principal borrower and two of the guarantors but in relation to this third appellant guarantor, the cause of action did not accrue with the first letter of demand but was held in abeyance until the second letter of demand was issued. Consequently, the Court of Appeal allowed the appeal finding that the second claim filed was time-barred.

[19] It must also be pointed out that the doctrine of estoppel as determined in *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 was also discussed. The Court of Appeal found from the facts that the withdrawal of the first action against the appellant on the same or substantially the same facts would be 'unjust and grossly prejudicial to the appellant'. The Court of Appeal further found that the respondent's own deletion of the words 'struck out with liberty' when withdrawing the first action against the appellant was 'a clear representation by the respondent that there would be closure of the matter'.

[20] The facts in *Joseph Thambirajah* are entirely different from those in the instant case. Specifically, the details pertaining to the first suit are sadly lacking. The defendants for reasons best known to them have opted not to offer any evidence, oral or documentary to explain what had transpired there. All that is available is the judgment of the court on 3 March 1998 just against the principal borrower and not some of the guarantors, and more importantly, the letter of demand of 10 March 1997, as pleaded in the statement of claim. In the circumstances, I am severely constrained to find that the claim against the defendants is not time-barred under s 6 of the Limitation Act 1953. The issue of estoppel does not arise in the facts of this case and neither is it pleaded.

WHETHER THE PLAINTIFF WAS UNDER A DUTY TO REALISE THE SECURITIES BEFORE FILING AN ACTION AGAINST THE DEFENDANTS

[21] This issue is approached by the defendants in this manner. A debenture

by way of a fixed charge over all of the fixed assets and a floating charge over all the undertakings and other properties of the principal borrower for the value of RM2m were provided as security for the repayment of the credit facilities. It was submitted by Mr Muthuraman that on 25 June 1997, the principal borrower had requested for the appointment of receivers and managers, supposedly to look after the interests of the principal borrower as well as the defendants. The plaintiff refused despite knowing that the principal borrower was not in the control of the defendants but in the control of third parties. The defendants say that as a result of the plaintiff's refusal, the debentures which were securities for the facilities were not realised in order to cover the debt. This refusal of the plaintiff was seen as misconduct and willful negligence on the part of the plaintiff which under s 92 of the Contracts Act 1950 discharges the defendants.

[22] In his reply, Mr Yap referred to several terms in the guarantee that in essence do not oblige the plaintiff to realise any of the securities. The plaintiff was at liberty to take such steps that it considered fit to enforce payment, and that included instituting legal proceedings.

[23] In my consideration, s 92 of the Contracts Act 1950 is a defence. Mr Muthuraman in his submissions in reply agreed that since no evidence was called, the court need not consider this issue. This has been my view from the outset but as indicated, I shall consider and give my decision on the issue for the sake of completeness.

[24] Section 92 provides:

> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

[25] Having examined s 92, I agree with the plaintiff's contention that this provision has no application for several reasons. In the first place, s 92 contains two limbs. Not only must the defendants prove either the refusal to appoint the receivers and managers is inconsistent with their rights to insist on such appointment, or that the plaintiff was under a duty to make such an appointment, the defendants must also prove that such refusal or failure to appoint impaired the defendants' eventual remedy against the principal debtor. I have been referred to some letters concerning the appointment but nothing more. This clearly does not satisfy the requirements of s 92.

[26] The next reason why the argument advanced under s 92 is without merit is the existence of the clear express terms to the contrary that are peppered

throughout the guarantee. For example, cll 11(a) and (f). Similarly, section 14.02 of the facility agreement. Generally, parties are free to contract out of the provisions of the Contracts Act 1950 — see *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 and this is precisely what the parties have agreed to do in the facts of this case. From these terms of the guarantee and the facility agreement, the plaintiff owes no duty to realise the security or debenture pledged. The language in the guarantee and the facility agreement in any event provide the plaintiff with the discretion or choice as to the steps or measures it considers best to enforce its remedies. The authorities are settled in this respect. See *Bank Bumiputra Malaysia Bhd v Esah Binti Abdul Ghani* [1986] 1 MLJ 16; *Raju Jayaraman Kerpaya v Chung Kiaw Bank Ltd* [1997] 2 MLJ 590; [1997] 3 CLJ 216; and *Bank of Tokyo Ltd v Gnansurian* [903] MD 2; [1989] 1 CLJ 344. The second issue is therefore also answered in the plaintiff's favour.

WHETHER THE PLAINTIFF WAS ENTITLED TO VARY THE INTEREST CHARGED WITHOUT NOTICE TO THE DEFENDANTS

[27] Although couched in those terms, the real issue posed by the defendants is whether the plaintiff can rely on the certificate of indebtedness that was prepared to conclusively prove its claim. The defendants submit that the answer must be in the negative because there are manifest errors in that certificate. The errors in the statement of account prepared and the failure of the plaintiff to notify the defendants of the changes in the bank's base lending rates (BLR) over the relevant period whether by way of direct notice or publication disentitles the plaintiff the right to impose these new rates; and rely on the certificate as conclusive evidence of the outstanding amount due. Since the plaintiff has not led any evidence on the computation of the outstanding sum, especially on the matter of interest, the plaintiff has thereby failed to prove its case and the claim must therefore be dismissed.

[28] From the evidence of PW1 and PW2, it is evident that the facilities were drawn down and enjoyed by the principal borrower. Mr Yap had also submitted, inter alia, that the certificate was conclusive and binding evidence of the debt as agreed in the relevant loan and guarantee documents. Relying on the decisions in *Phonographic Performance Ltd v Maitra; Same v Andrew & Anor; Same v The Underworld (Bradford) Ltd* [1998] 1 WLR 870 and *Microsoft Corp v PC House (Imbi) Sdn Bhd* [1998] 6 MLJ 402, learned counsel submitted that though a judgment in default, that judgment is one nevertheless premised on the facts as pleaded in the statement of claim with the pleaded facts deemed to be admitted. It is not the sole evidence of the sum claimed but such judgment can be relied on to prove the plaintiff's case against the defendants: *Ex parte Young* (1908) 209 US 123, SC. *In re Kitchin* (1881) 17 Ch D 668.

[29] I have carefully considered the evidence and the submissions on this last issue. Pursuant to cl 19 of the guarantee, the parties have agreed that 'A certificate by any of our officers as to the money and liabilities for the time being incurred is due to you by or from the customer shall be conclusive evidence in any legal proceeding against us our executors administrators or legal representatives'. The position of such certificates of indebtedness has been so well defined and settled so as to be trite law. The Federal Court in the off-cited decision in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 at p 694; [2006] 3 CLJ 544 at p 554 reminded that 'A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed'. This must be the position as the court is determining parties' rights and obligations as set out in the relevant contract documents which both parties had freely contracted and agreed as their binding terms. The court is now merely interpreting and applying those contractual terms when determining a disputed claim.

[30] In the statement of claim, the sum claimed is RM1,576,050.42; together with interest at the rate of 2.5%pa above the BLR on the sum of RM508,553.23 for the overdraft facilities; commission at 0.1 % per month or a minimum of RM50per issuance of the letters of credit; interest at the rate of 2%pa plus BLR on the trust receipts; and, commission at 2%pa on the bankers acceptances. All these interests and commission charges were claimed from 2 March 1997 till the date of realisation. The certificate of indebtedness prepared by PW1 and counter-signed by Julie Lee Ley San, Head of Credit Recovery Centre (NHP), Kuala Lumpur certifies that the outstanding sum of RM1,576,050.42 is payable by the principal borrower and the defendants as at 1 March 1997. This is the same amount as that pleaded in the statement of claim. The certificate also provides details of the various interests and commissions levied on the different facilities granted, their rates and the periods when such rates were imposed. These rates are the same as those provided for in the letter of offer dated 31 October 1995 which document is one that must be read together with the facility agreement and the guarantee. The calculations in the certificate are good up to 1 March 1997 and this is the same sum claimed in the statement of claim. The calculations in the statement of account take up the calculations from 2 March 1997 to 30 September 2009. The certificate further indicates how the future amounts of interests will be calculated. Although there is no indication of how much of RM1,576,050.42 comprises the principal sum and how much represents the interests and commission imposed, PW1 has explained that it comprises both elements for the total facilities drawn down. To me, this is immaterial as this is what the parties agreed on for settlement of the outstanding sums. PW1's explanation is reasonable and acceptable as it accords with the parties' arrangement as reflected at cl 19 of the guarantee. This absence is not an error, manifest or

otherwise, that renders the certificate of indebtedness no longer conclusive evidence of the outstanding debt due from the defendants.

[31] In the matter of interest, the defendants have agreed in the contract documents that the plaintiff has the right and discretion to vary the interests and bank charges without notice to the defendants — see the letter of offer and section 7.06 of the facility agreement. The only outstanding issue is whether taking the position that there have been changes to the BLR, the plaintiff is obliged to offer proof of publication of such changes. The defendants relied on the High Court decision in *Perwira Affin Bank Berhad (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Berhad)* Kuala Lumpur High Court Civil Suit No D2–22–1557 Tahun 1998 (unreported). In that decision, the court disallowed the claim on interest because there was no evidence of notification of variation of the interest rates. Nevertheless, the guarantors were not discharged and the bank was allowed its claim with post-judgment interest under O 42 r 12 of the Rules of the High Court 1980. The facts here are different. In the present case, what is challenged is the change to the bank's BLR which according to section 7.06 requires publishing in a newspaper of the plaintiff's choice. The defendants' contention is that the plaintiff is obliged to produce the relevant newspapers bearing the changes to the BLR. Failure to do so disentitled the plaintiff to the element of interest.

[32] With the submissions taken by the defendants that there is no need to lead evidence as the plaintiff has failed to prove its claim, I am left with the uncontested evidence in the form of certificate of indebtedness. All that the defendants have done is to ask for production of variations of BLR. The asking of questions calling for the production of publications does not discharge the defendants from the burden of proving manifest errors. The defendants have done nothing more and more is certainly required. Again, bearing in mind the role and significance of the certificate of indebtedness which in effect dispenses with the very requirement that the defendants are now seeking of the plaintiff, I am unable to agree with the defendants. The certificate loses its quality of representing conclusive evidence where the defendants can show there are manifest errors in that certificate. The burden of proving the existence of error lies with the defendants. Having chosen not to adduce any evidence, the certificate tendered by the plaintiff is not only conclusive evidence of the outstanding debt, it is also true in the component of correct prevailing BLR rates which PW1 has testified that the plaintiff has published, as is its usual practice. There is no evidence to the contrary before me. This is different from the facts in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363; [1995] 3 CLJ 690 where evidence was produced to cast doubt on the accuracy of the certificate, and *Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors* [1990] 2 CLJ (Rep) 585 where the defendant offered evidence of a reduction of the BLR that was not reflected as accorded to the

defendant. The plaintiff bank in the latter case maintained its claim at the higher BLR when the evidence showed reduced BLR.

[33] By virtue of these reasons, I am satisfied that contrary to the defendants' submission, the plaintiff has indeed proved its claim on a balance of probabilities. Since the defendants have made an election not to adduce evidence at the start of their submission, it only leaves me one option with such finding and that is to allow the plaintiff's claim as prayed at para 14(i)–(v) together with costs of RM50,000 inclusive of the interlocutories. The inclusion of the costs relating to interlocutories was upon proposal from both counsel.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan